1961

Nickerson Pump & Machinery Co., Inc. v. State Tax Commission of Utah : Reply Brief of Plaintiff

Utah Supreme Court

IN THE SUPREME COURT
of the
STATE OF UTAH

NICKERSON PUMP & MACHINERY CO., INC.,
Plaintiff,

vs.

STATE TAX COMMISSION OF UTAH,
Defendant.

Case No. 9353

REPLY BRIEF OF PLAINTIFF

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PURPOSE OF THIS BRIEF

Analysis demonstrates that Defendant's Brief (identified herein as DB), is, in the main, beside the point. Specifically, it embodies a tripartite tactic: (1) misidentification of plaintiff's position (embracing at one point a paraphrasing of a taxpayer's argument in an entirely different case), followed by: (2) citation of authorities in no wise inconsistent with plaintiff's true approach, followed by: (3) assertion (bulwarked by no discussion whatever of the largely stipulated and

undisputed facts of record) that "there can be no question" or "(i)t is apparent" that plaintiff consumes the subject pump assemblies[1]. The field thus littered with straw men, defendant asks endorsement of the tax imposition under review.

The straw men so conjured represent, however, new issues and necessitate reply. They are:

(A) That plaintiff, if not technically a "consumer", is a "user" (DB, pp. 7-8); and

(B) That plaintiff, being a "contractor", is *per se* a "consumer" (DB, pp. 6-12).[2]

In an attempt to support its argument, defendant depends to a considerable extent upon non-Utah decisions (13 of 16). Because of plaintiff's equally great reliance upon Utah decisions (15 of 18), defendant raises a third new issue. It is:

(C) That the Utah decisions cited by plaintiff "have already been severely criticized by this Court" (DB, p. 2).

It is the purpose of this brief to demonstrate the impropriety of the defendant's arguments. Additionally, attention shall be paid defendant's concession of error (DB, p. 2) with respect to Points II and III of Plaintiff's Brief.

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[1]Sometimes called pumps herein and in Plaintiff's Brief (PB).

[2]Plaintiff will not attempt to deal with another possible new issue through untangling the process by which defendant seizes upon a footnote (PB, p. 14), elevates it to the status of a contention, adds some purported implications to it, and then concludes that plaintiff is begging the question (DB, pp. 4-5). Suffice it to say that defendant seems to agree with plaintiff that the *assembly* of pumps is not in itself a taxable act, and that the issue is whether the *emplacement* of the pumps thus assembled constitutes plaintiff a consumer (PB, pp. 13-14; DB, p. 2).

STATEMENT OF FACTS

Plaintiff controverts defendant's addendum to plaintiff's statement of facts.

1. The pump assemblies are not "specifically engineered for the particular need involved" if, by this, defendant means that each pump is specifically suitable for one well and no other. The uncontradicted testimony was that a given well can receive various pumps and that a given pump can fit various wells. Pumps are exchanged between different wells, are traded in, and are resold (R. 53-54, 56, 67, 71-72, 74, 95).

2. Defendant's enumeration of the items included in a lump sum contract is misleading in that:

(A) The first four items listed are not different in kind, but rather are all parts of a deep well line shaft assembly or, more shortly put, deep well line shaft pump sold by plaintiff (R. 49, 113).

(B) Two other types of pump assemblies, with different component parts, sold by plaintiff are involved: submersible deep well pumps and booster pumps (R. 47).

STATEMENT OF POINTS

1. PLAINTIFF IS NOT A "USER".

2. PLAINTIFF IS NOT A CONSTRUCTION CONTRACTOR.

3. UTAH DECISIONS SUPPORT PLAINTIFF'S POSITION.

4. DEFENDANT'S CONCESSION OF ERROR REQUIRES, AT THE LEAST, MODIFICATION OF THE DECISION UNDER REVIEW.

ARGUMENT

I.

PLAINTIFF IS NOT A "USER".

Defendant would have the Court believe that it is plaintiff's view that "consume" must be given a "narrow definition", to-wit: "to destroy", "to use up" and "to expend". While such may have been the argument of the taxpayer in the case from which defendant lifted, with minimal paraphrasing, its language on this point, *J. W. Meadors & Co. v. State,* 89 Ga. App. 583, 80 S.E. 2d 86, 87-88 (1954), it most certainly is not plaintiff's contention herein.

Plaintiff's position (explained with care in DB, pp. 14-20) is this: (1) three Utah decisions define the term "consumer", *Western Leather & Finding Co. v. State Tax Commission,* 87 Utah 227, 48 P. 2d 526 (1935); *Utah Concrete Products Corp. v. State Tax Commission,* 101 Utah 513, 125 P. 2d 408 (1942); *Union Portland Cement Co. v. State Tax Commission,* 110 Utah 135, 170 P. 2d 164 (1946); (2) under such definitions, *and each of them,* plaintiff is not—on the basis of the undisputed facts of record[3]—a consumer. While plaintiff is

[3]Defendant, after setting forth its preferred definitions, (understandably) does not apply them to the facts of record. Rather it sets forth tests in isolation, then jumps to a conclusion that plaintiff's business meets such tests. Contrast plaintiff's extensive discussion of the applicable undisputed facts (PB 16-20, 33-35). Defendant's

somewhat concerned, abstractly, with defendant's assertion that *Utah Concrete Products Corp.* established a "liberal"[4] definition for the term "consumer", *the fact remains that plaintiff* (at PB, pp. 15-16, 18-19) *dealt with such definition* ("liberal", "conservative", "broad", "narrow" or whatever) *and demonstrated that plaintiff does not fall within the ambit of Sales and Use Tax liability as therein delineated.*

Nor is plaintiff a "user" within the meaning of the definitions and out-state decisions preferred by defendant. A user is one whose use of a given article is the "ultimate use to which all intermediate ones lead", *Albuquerque Lumber Co. v. Bureau of Revenue,* 41 N.M. 58, 75 P. 2d 334, 338 (1938); the ultimate use and employment of the pumps in question is to pump water, and plaintiff does not do so. Plaintiff does not diminish or destroy the utility of the pumps; rather, through emplacement, it activates their utility; nor does plaintiff keep and enjoy the presence or prospect of the pumps. If, as stated in *J. W. Meadors & Co. v. State,* supra, "consumption means using things, and production means adapting them for use" (DB, p. 8), and the two are contradistrict, it seems quite obvious that plaintiff's emplacement of pumps constitutes an "adaptation for use" and, hence, is not a taxable act as consumption.

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attention is directed to the language, at 80 S.E. 2d 89, of its mentor, the Georgia Court of Appeals:

> "It is what happened and not what might have happened that determines legal consequences in a case such as this . . . This court has no choice but to treat with the legal consequences demanded by the facts as the parties made them."

[4]For tax statutes are not construed liberally in favor of the State; they are construed strictly against it, *Pacific Intermountain Express Co. v. State Tax Commission,* 8 Utah 2d 144, 329 P. 2d 650, 651 (1958).

II.

PLAINTIFF IS NOT A CONSTRUCTION CONTRACTOR.

Defendant, citing *State v. J. Watts Kearney & Sons,* 181 La. 554, 160 So. 77 (1934), proclaims that "(s)ales to contractors are sales to consumers . . ."; therefore apparently concludes that since plaintiff admittedly enters into contracts (both with private and public buyers, both lump-sum and non lump-sum), it is a consumer.

On its face, defendant's contention is untenable. All persons selling under contracts of sale and emplacement are not "users" or "consumers." Defendant's own regulations recognize this (PB 25-27). So do the cases that defendant cites. Each deals with *construction* contractors or subcontractors who were found, under the facts, to have consumed materials used in the building of a structure, i.e., to have been "the last persons in the chain to deal with such products before incorporation into a separate entity and before such products lost their identity as such . . .", *Utah Concrete Products Corp.*[5]

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[5] *Albuquerque Lumber Co. v. Bureau of Revenue,* supra, (heating and general contractors); *Atlas Supply Co. v. Maxwell,* 212 N.C. 624, 194 SE 117 (1937) (plumbing and heating contractors); *City of St. Louis v. Smith,* 342 Mo. 317, 114 SW 2d 1017 (1938) (paving, sewer and hospital contractors—how this case demonstrates that the pump assemblies herein lose their identity or are incorporated into a separate entity—DB, p. 9—escapes plaintiff); *Craftsman Painters & Decorators v. Carpenter,* 111 Colo. 1, 137 P.2d 414 (1942) (painting and electrical contractors); *Duhame v. State Tax Comm.,* 65 Ariz. 268, 179 P.2d 252, 171 ALR 684 (1947) (building contractor); *Harding v. Oklahoma Tax Commission,* 275 P.2d 264 (Okla., 1954) (masonry contractor); *Herlihy Mid-Continent Co. v. Nudelman,* 367 Ill. 60, 12 NE 638, 115 ALR 491 (1938) (sewer and tunnel contractors); *J.W. Meadors & Co. v. State,* supra (building contractor);

As stated in *J. Watts Kearney,* at 160 So. 78:

> "A contractor who buys material is not one who buys and sells—a trader. He is not a dealer, or one who habitually and constantly, as a business, deals in and sells any given commodity. He does not sell lime and cement and nails and lumber.
>
> "His work is to deliver to his obligee some work or edifice or structure, the construction of which requires the application of skill and labor to these materials so that, when he finishes his task, the materials purchased are no longer to be distinguished, but something different has been wrought from their use and union. The contractor has not resold but has consumed the materials."

Plaintiff need not impeach defendant's cases, for despite defendant's bare assertion to the contrary, (DB, p. 12), plaintiff is not a construction contractor. Plaintiff does no construction work whatever. Prior to the emplacement of deep well pump assemblies, the buyer, acting individually or through an independent contractor other than plaintiff, digs the water well and lines it with casing (R. 47, 49, 78-79). The buyer, not plaintiff, also builds a concrete foundation around the mouth of the well and builds a water line extending toward the pump (R. 47-48, 81-82). Plaintiff does sell pump assemblies, doing so habitually and constantly, as a business. Its task is not to deliver to its obligee some work or edifice or structure. It

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Lone Star Cement Co. v. State Tax Commission, 234 Ala. 465, 179 So. 399 (1937) (general contractor); *State v. Christhilf,* 170 Md. 586, 185 A. 456 (1936) (road and building contractors); *State v. J. Watts Kearney & Sons,* 181 La. 554, 160 So. 77 (1934) (building contractor); *Volk v. Evatt,* 142 Ohio App. 335, 52 NE 2d 338 (1943) (heating contractor); *York Heating & Ventilating Co. v. Flannary,* 87 Pa. Super. 19 (1926) (heating contractor).

merely delivers and emplaces the pump assembly. After its work is completed, the pump assembly delivered remains distinguishable as such.

A construction contractor, being a consumer in fact, is subject to tax on such consumption whether accomplished under lump-sum or non lump-sum contracts, *J. W. Meadors & Co. v. State,* supra. Equally, one who delivers and emplaces machinery which—after emplacement—retains its identity is not a consumer, whether or not a lump-sum contract is used, *General Electric Co. v. State Board of Equalization,* 111 Cal. App. 2d 180, 244 P. 2d 427 (1953). The latter case is particularly important for, therein, the sale, delivery and emplacement of a very expensive, multi-ton machine was held not to constitute use or consumption, although the facts established that—unlike the pump assemblies here involved (PB 33-35)—such machine was a fixture.

Construction contractors may be consumers. Plaintiff is not.

III.

UTAH DECISIONS SUPPORT PLAINTIFF'S POSITION.

Defendant does not, in its brief, offer any support for its charge that the Utah decisions relied upon by plaintiff "have already been severely criticized by this Court". Perhaps it should be disregarded, therefore, as a mere random scoff. Since it implies intellectual dishonesty on the part of plaintiff, however, attention will be paid it.

Plaintiff has rechecked *Shepard's Utah Citator,* including supplement, and examined the cases there listed. It is found that:

(1) *Western Leather & Finding Co.* was criticized by the author Justice and disapproved by another Justice in *Utah Concrete Products Corp.* Its definition of "consumer", however, was cited approvingly in a later decision, *Union Portland Cement Co.*, authored by the same Justice as *Utah Concrete Products Corp.*

(2) *Union Portland Cement Co.* was modified on rehearing, 110 Utah 152, 176 P.2d 879 (1947), but on a point entirely separate from its definition of "consumer".

Plaintiff finds no other criticism (severe or otherwise) by this Court of plaintiff's authorities on the points for which citation was made.

As has been noted (and despite defendant's seeming desire to abridge away at plaintiff's argument), plaintiff has not wedded itself to any one definition of "consumer" found in the three Utah decisions in point. Plaintiff is inclined to the view that they complement one another and has demonstrated that, under *each* of them, it is not a consumer.

IV.

DEFENDANT'S CONCESSION OF ERROR REQUIRES, AT THE LEAST, MODIFICATION OF THE DECISION UNDER REVIEW.

Plaintiff appreciates defendant's candid (if belated[6]) stipulation and concession that "the penalties mentioned in

[6]And, to plaintiff, expensive: to-wit, six pages of plaintiff's brief (actual Salt Lake Times expenditure: $9.60; allowable cost: $7.50, U.C.R.P. 75 (p) (4)) and $544.65 of the $2,728.56 deposited by plaintiff with defendant on October 11, 1960 (the use of which plaintiff has lost until performance of the Court's mandate herein).

petitioner's (i.e. plaintiff's) Point II were improperly assessed and that its Point III is valid" (DB, p. 2). At least three consequences follow: (1) it renders harmless defendant's misstatement (DB, p. 2) that plaintiff concedes that it is "subject to the sales or (sic.[7]) use tax *as assessed*"[8] if plaintiff "is found to be the consumer of the pump assemblies in question". For plaintiff concedes nothing of the sort. Both such Points II and III, of course, explicitly prayed reversal regardless of the eventual resolution of the "consumer" issue. (PB, pp. 39-42); (2) the final sentence of defendant's brief that "(t)he decision of the Tax Commission should be affirmed" (DB, p. 13) is miswritten; to the extent that the assessment included penalties (Point II) and items disputed in Point III, defendant "concedes and stipulates" the error of its affirmance of Auditor Buttolph's deficiency assessment; (3) in terms of dollars and cents, defendant admits by its concession that, even if it prevails on the "consumer" issue, it should return to plaintiff $544.65.[9]

CONCLUSION

If defendant's view of plaintiff as a consumer is correct, the assessment must be modified as specified in Point IV herein.

Defendant's view, however, is not correct. Plaintiff, in

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[7]The instant deficiency assessment includes both a sales tax portion and a use tax portion. The Code likewise itemizes the taxes separately. Defendant should, therefore, have used the conjunctive "and" rather than the disjunctive "or."

[8]Emphasis supplied.

[9]A tabulation of the deficiency amount owing as of payment, if the concededly erroneous items are deleted, constitutes Exhibit A hereto.

the subject transactions, was not a consumer (or user) either in fact or in law. Accordingly, the tax imposition should be vacated.

Respectfully submitted,

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EXHIBIT A

Schedule A

RESUME' OF ASSESSMENT MODIFICATIONS OCCASIONED BY DEFENDANT'S CONCESSION OF THE VALIDITY OF POINTS II AND III OF PLAINTIFF'S BRIEF

A. *Point II*: Elimination of penalties and reduction of interest on deficiencies to six percent per annum.

B. *Point III*:

Subpoint 1: (1) Reduction of the amount listed at line 1, Schedule 4, page 2 to $2,693.08.

(2) Reduction of the amount listed at line 2 of the 1959 portion of Schedule 4, page 4 to $987.36.

Subpoint 2: Elimination of the item listed at line 9, Schedule 4, page 2 (amount: $620.03).

Subpoint 3: Rendered moot by defendant's concession of plaintiff's Point II.

Subpoint 4: (1) Elimination of the item listed at line 7, Schedule 4, page 3 (amount: $781.76).

(2) Elimination of the item listed at line 1, 1959 portion of Schedule 4, page 4 (amount: $4,563.48).[10]

(3) Elimination of the item listed at line 4, 1959 portion of Schedule 4, page 4 (amount: $111.37).[10]

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[10]These items have not been eliminated from the use tax adjustments hereafter. Inasmuch as the sales tax statute of limitations has not run on them, they should be considered, if defendant is considered a consumer, as delinquent sales tax payments.

(4) Elimination of the items listed at lines 7 and 8, 1959 portion of Schedule 4, page 4 (amount: $216.36).[10]

(5) Elimination of the item listed at line 11, 1959 portion of Schedule 4, page 4 (amount $390.00).[10]

Schedule B

RESUME' OF CONSEQUENT ADJUSTMENTS IN EXHIBIT A OF AMENDED SUMMARY OF SALES TAX ADJUSTMENTS

	Adjusted Total
(1) 1956: elimination of penalty and reduction of interest to 6% per annum on $4.84 from 12-15-56 to 10-11-60 (interst[11] total: $1.15).	$ 5.99
(2) 1957: elimination of penalty and reduction of interest to 6% per annum on $133.44 from 9-15-57 to 10-11-60 (interest total: $24.62).	158.06
(3) 1958: elimination of penalty and reduction of interest to 6% per annum on $22.49 from 9-15-58 to 10-11-60 (interest total: $2.80).	25.29
Total Sales Tax Due on 10-11-60	$ 189.34

[11]All interest has been computed from *Coffin's Interest Tables* (Winston Company, 1946).

Schedule C

RESUME' OF CONSEQUENT ADJUSTMENTS IN EXHIBIT B OF AMENDED SUMMARY OF USE TAX ADJUSTMENTS

	Adjusted Total
(1) 1955: elimination of penalty and reduction of interest to 6% per annum on $329.16 from 12-15-55 to 10-11-60 (interest total $96.94).	$ 426.10
(2) 1956: reduction of principal to $421.39, elimination of penalty and reduction of interest to 6% per annum on $421.39 from 9-15-56 to 10-11-60 (interest total: $103.00).	524.39
(3) 1957: reduction of principal to $342.07, elimination of penalty and reduction of interest to 6% per annum on $342.07 from 9-15-57 to 10-11-60 (interest total: $63.11).	405.18
(4) 1959: elimination of penalty and reduction of interest to 6% per annum on $591.94 from 6-15-59 to 10-11-60 (interest total: $46.96).	638.90
Total Use Tax Due on 10-11-60	$1,994.57

Schedule D

COMPUTATION OF AMOUNT CONCEDED BY DEFENDANT TO BE IMPROPERLY COLLECTED

(1) Amount of Tax and Interest Collected 10-11-60:	$2,728.56
(2) Amount of Tax and Interest Defendant Now Claims, Computed as of 10-11-60:	2,183.91
(3) Amount of Tax and Interest Erroneously Collected:	$ 544.65